SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 554

JOHN T. CHAMBERS,

Petitioner

v.

W. M. BEAUCHAMP, ADMINISTRATOR OF THE ESTATE OF D. P. PECK, DECEASED, AND CARL ANDREW CHAMBERS,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of New Mexico (Appendix B, Page B-1 of the Petition) is reported at 454 P.2d 772 and will be included in Volume 80 N. M. when published.

JURISDICTION

There is no jurisdiction to review the decision of the Supreme Court of New Mexico for the reason that the constitutional questions raised by the petitioner for Writ of Certiorari were first presented to the Supreme Court of New Mexico by Motion for Rehearing after the Opinion had been written. The Motion for Rehearing was denied without Opinion, and the Opinion of the Supreme Court was based on the same construction and application of New Mexico law as the Decision of the District Court.

QUESTION PRESENTED

Whether or not the Decision of the Supreme Court of New Mexico violated petitioner's rights under the Constitution of the United States by denying him due process of law under the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States, or violated the full faith and credit clause of Article IV, Section 1 of the Constitution of the United States.

STATUTES INVOLVED

In addition to the statutes set out in Appendix "H" of the Petition, the following is also deemed pertinent:

Rule 335, Vernon's Texas Rules of Civil Procedure, Volume 3, compiled under Section 12, Review by District Courts of County Court Rulings, Subsection A, Guardianships and Estates of Decedents, reads, in material part:

> "The appeal shall suspend the decision, order, decree, or judgment, or the designated portion thereof appealed from, except as may be otherwise expressly provided by law; * * *."

STATEMENT

It is deemed necessary to supplement the Statement contained in the Petition for Writ of Certiorari to provide certain pertinent facts omitted therefrom.

Petitioner, John T. Chambers, seeks to recover for himself the whole of his deceased uncle's estate and to deprive his own brother and his own nephew from any share therein. Under the applicable laws of descent and distribution, each of said three heirs-at-law would receive an equal one-third (1/3rd) share.

Petitioner's effort is based on a purported Will which was signed by his uncle in Dallas, Texas, in 1964, when D. P. Peck was approximately 77 years old and had been mentally deranged for some 54 years, and after petitioner had his uncle released to his custody in 1963 from the Larned State Hospital for the Insane in the State of Kansas, had placed him in a rest home in Dallas, and had himself appointed as Guardian in Dallas County, Texas, under a Petition alleging that his uncle was still of unsound mind.

The whole of D. P. Peck's estate stems from a single half section of land in Lea County, New Mexico, described as the West Half (W½) of Section 26, Township 12 South, Range 37 East, N.M.P.M., on which Peck made his homestead entry on February 25, 1909, and the whole of said estate was at all times located and administered in the State of New Mexico throughout the lifetime of D. P. Peck. After the original entry in 1909, a Patent was finally issued on this half section on August 21, 1931, to David P. Peck, with a later Patent being subsequently issued on December 21, 1939, in lieu of and to correct the previous Patent, which had erroneously contained a reservation of oil, gas and potash.

The events between 1909 and 1931 are especially significant and appear from the certified and authenticated photostatic copies of all the documents and records of the General Land Office relating to the issuance of these two (2) Patents, which were admitted into evidence in the hearing before the District Court of Lea County, and which documents were certified under the seal of the General Services Administration, National Archives and Record Service, as being on file in the National Archives in Washington, D. C.

After making his homestead entry in 1909, Peck on Au-

gust 14, 1912, submitted his final proof, in which he stated that he first established his residence on April 15, 1909, built a house, dug a well, set up outbuildings, strung wire and cultivated 40-80 acres each year from 1909 to 1912. He also reported occasional absences from the land, which in 1911 and 1912 added up to 5½ months each out of the entire year. In support of his proof, he submitted the Affidavits of two neighbors, who swore to his entry and actual residence on the land for three years. In his Notice of Intention filed on June 18, 1912, Peck stated his residence as being Scott, New Mexico, (now Gladiola, New Mexico), being the post office nearest the said land.

On April 18, 1913, the General Land Office rejected Peck's proof under the Act of June 6, 1912, on the ground that for the years 1911 and 1912 accumulated absences exceeded the maximum five months per year, but advised that new proof might be made when five years residence were shown from April 15, 1909, under the five year law or under the three year law by showing further residence of at least seven months since the submission of the proof in question. No appeal having been made therefrom, patent authorization was cancelled on October 14, 1913. Peck's entry, however, subject to later proof, still remained on file in the Land Office at Las Cruces, New Mexico.

On December 22, 1927, the Land Office in Las Cruces sent Peck notice that, unless he made final proof, his claim would be forfeited and his entry cancelled. No reply having been received from Peck (correspondence was mailed to an old address), the General Land Office in Washington, D. C., cancelled his entry on April 19, 1928.

On July 22, 1929, D. P. Peck's father, E. C. Peck, wrote to the Commissioner of the General Land Office advising that he had paid the taxes on the half section in question for the past sixteen (16) years on behalf of his son, and that he had only recently become aware of the cancellation of his son's entry, and that he wished to have the entry reinstated. His letter further states that his son, some months after receiving a Certificate that proof had been made, had returned to his parents'

home in Kingman, Kansas, in a deranged state of mind. Formal application for reinstatement of the cancelled entries were duly made. Supporting documents and affidavits reveal that Peck was later adjudged insane on December 24, 1914 by the Probate Court of Kingman County, Kansas, and committed to the State Hospital for the Insane at Osawatomie, Kansas, and in 1923 was transferred to Larned State Hospital for the Insane at Larned, Kansas, his mental derangement having existed for two or more years prior to December 24, 1914, when he was adjudged insane. When transferred to the Larned State Hospital, Peck was suffering from Dementia Praecox, paranoid type, a psychosis, and it was at that time concluded that in all probability he would be confined to an institution for the rest of his life.

On May 1, 1930, the acting Commissioner of Lands wrote the Register in Las Cruces reinstating the entry. In part, the acting Commissioner wrote:

> "The entryman is evidently entitled to consideration under the act of June 8, 1880 (21 Stat. 166). The fact of the entryman's insanity was unknown to this office at the time his proof was rejected and at the time his entries were canceled.
>
> "Upon consideration of the case under the five year law, it sufficiently appears that the entryman complied with the law up to the time he became insane. The entries now combined under one serial 040591, are, therefore, reinstated."

The entry was finally confirmed by the General Land Office on July 14, 1931. In 1939, when a corrected Patent was issued, eliminating the oil, gas and potash reservation, the Land Commissioner wrote:

> "Later E. C. Peck, as guardian, filed an application for reinstatement of the entries was allowed additional time within which to make further showing. In this, it was disclosed that the entryman was adjudged to be of unsound mind on December 24, 1914, *that he was found*

to be mentally unsound for about two years prior to that time, which would fix his period of incompetency as beginning in 1912, *and that the insanity continued and was reported as incurable."*

Peck's estate was always located and administered in the State of New Mexico; W. M. Beauchamp was appointed Guardian of his estate in 1939 on the Petition of Peck's mother, and continued in that capacity until after Peck's death and his appointment as Administrator. It is to be noted that W. M. Beauchamp was appointed Guardian of the estate some thirty years before The Honorable Kermit E. Nash ever ascended to the Bench. The District Court of Lea County in its Decision found that "there was and is no property of the decedent in any other state." This finding was amply supported by the evidence and was not attacked in any manner by the petitioner.

In 1963, when Peck was then 77 years old, his nephew, the petitioner, had him released to his custody by the Larned State Hospital. At this time, Peck was not cured of his mental illness, his mental illness was incurable, but there was nothing more that could be done in the way of treatment; and since he was not violent, he could be cared for as well in a rest home. The petitioner took Peck to Dallas and placed him in Terrell's Rest Home. In September of 1963, the petitioner had himself appointed as Peck's Guardian in a Dallas Court, attaching to his Petition a letter from a Texas doctor, which stated that on August 1, 1963, he had examined Peck and found him to be of unsound mind and unable to manage his personal affairs. It was following this, on May 12, 1964, that Peck signed the purported Will leaving his entire estate to the petitioner, or in the event of the prior death of petitioner, then to petitioner's children.

Within ten (10) days following Peck's death on September 4, 1966, W. M. Beauchamp, through counsel, requested petitioner to bring the purported Will to New Mexico, where the estate was located, and to offer it for probate, if petitioner maintained it was a valid Will. This petitioner never chose to do, and some five months later, said W. M. Beauchamp finally

commenced proceedings for administration of the estate in New Mexico.

At the hearing in the District Court of Lea County, the Administrator offered by deposition the testimony of Dr. D. H. Davis, a duly licensed medical doctor of the State of Kansas, and a member of the psychiatric staff of the Larned State Hospital, who had past personal acquaintance with Peck and personal knowledge of his condition at the time he left Larned. In addition, the Administrator offered the testimony of Dr. Warren T. Brown, now of Albuquerque, New Mexico, who listed among his qualifications teaching and serving as Chairman of the Department of Psychiatry and Mental Hygiene at Yale University, neuro-psychiatric consultant to the West Pacific Base Command during World War II, and Professor and Chairman of the Department of Psychiatry and Neurology at Baylor University College of Medicine in the Texas Medical Center in Houston, Texas. Petitioner countered only with T. Mack Terrell, owner and operator of Terrell's Rest Home.

Counsel for petitioner in his Brief-In-Chief filed in the New Mexico Supreme Court admitted with respect to his only witness, J. Mack Terrell, "It is impossible to point out any one portion of Mr. Terrell's testimony which would indicate that David P. Peck was in control of all his faculties in 1964 or that he was knowledgable of the natural objects of his bounty or the nature of his estate * * *."

The hearing before the District Court of Lea County was initially set for May 2, 1967. The Affidavit of Disqualification filed by petitioner stated that none of the three Judges of the Fifth Judicial District could, according to the belief of petitioner, preside over the action with impartiality. These three Judges were The Honorable George L. Reese,, residing at Roswell, Chaves County, New Mexico; The Honorable Caswell S. Neal, residing at Carlsbad, Eddy County, New Mexico, and The Honorable Kermit E. Nash, residing at Hobbs, Lea County, New Mexico. This proposed disqualification was not made on any constitutional grounds, as set forth in the New Mexico Constitution, and was not accompanied by any motion, but rather was merely an attempted statutory disqualification,

which does not set forth any facts on which the alleged impartiality is based.

On May 1, 1967, counsel for petitioner served a Motion for Continuance on counsel for the Administrator, and on May 3, 1967,, secured and filed an Order signed by District Judge Kermit E. Nash continuing the hearing to June 19, 1967. Previous to serving the Motion for Continuance, petitioner's counsel had obtained the consent of the Administrator's counsel to a continuance, and at that time stated he was aware that by obtaining an Order for Continuance he would be waiving the Affidavit of Disqualification previously filed. The Motion for Continuance states as its sole ground the fact that counsel had not had sufficient time to properly prepare for trial.

Following the entry of the District Court's Decision, petitioner in appealing to the New Mexico Supreme Court, only filed a Praecipe for a portion of the record, and in setting forth his points to be relied on in the appeal, made no mention, whatsoever, as to the attempted disqualification, on which he now relies so strongly. Likewise, petitioner's Brief-In-Chief in the New Mexico Supreme Court contains no Point directed to this question, but merely contains a short reference to it at the end of the Brief. No mention is made of the Fifth or Fourteenth Amendments to the United States Constitution in either petitioner's Brief-In-Chief or Reply Brief in the New Mexico Supreme Court under any of the Points therein raised. The first mention of due process and equal protection appears in petitioner's Brief in Support of Motion of Rehearing in the New Mexico Supreme Court.

ARGUMENT

I.

Certiorari Will Not Issue to Review a Decision of a State Court of Last Resort on Constitutional Issues Presented for the First Time on Motion for Rehearing.

An unbroken line of decisions of this Court hold that certiorari will not issue to review a decision of the court of last resort of a state upon Federal constitutional questions that were not presented to the state court until motion for rehearing afer final opinion. Typical of these cases is the case of *American Surety Company v. Baldwin*, 287 U.S. 156, 53 S.Ct. 98, 77 L.Ed. 231, 86 A.L.R. 298, (1912). The Court there said:

> "The Surety Company petitioned for a rehearing. In that petition, besides reiterating several of its previous contentions, it urged, for the first time, that the rendition of the judgment on its undertaking violated the due process clause of the Fourteenth Amendment. The petition was denied without opinion. The federal claim there made cannot serve as the basis for review by this Court. The contention that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. The same ground of objection had been raised throughout the proceedings but solely as a matter of state law. There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. Compare Corkran Oil & Development Co. v. Arnaudet, 199 U.S. 182, 193, 50 L.Ed. 143, 149, 26 S.Ct. 41; Godchaux Co. v. Estopinal, 251 U.S. 179, 181, 64 L.Ed. 213, 214, 40 S.Ct. 116; Live Oak Water Users' Asso. v. Railroad Commission, 269 U.S. 354. 357, 70 L.Ed. 305, 308, 46 S.Ct. 149. This is not a case where, as in Saunders v. Shaw, 244 U.S. 317, 320, 61 L.Ed. 1163, 1165, 37 S.Ct. 638, the federal claim arose from the unanticipated disposition of the case at the close of the proceedings in the state Supreme Court. Compare Ohio ex rel. Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74, 79, 74 L.Ed. 710, 715, 66 A.L.R. 1469, 50 S.Ct. 228. Nor is the federal claim based, as in Brinerhoff-Faris Trust &

Sav. Co. v. Hill, 281 U.S. 673, 678, 74 L.Ed. 1107, 1112, 50 S.Ct. 451, upon the unanticipated act of the state Supreme Court in giving to a statute a new construction which threatened rights under the Constitution. Compare Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313, 320, 74 L.Ed. 870, 875, 50 S.Ct. 326."

The case at bar does not come within any of the exceptions to the settled rule. The Supreme Court of New Mexico denied the Motion for Rehearing which first raised the federal constitutional questions without opinion. The Decision of the District Court and the Decision of the Supreme Court were based upon the same construction and application of New Mexico law. If a federal constitutional question was to be relied upon, it should have been presented to the trial court, and in any event to the Supreme Court of New Mexico upon the appeal and not for the first time upon Motion for Rehearing. There was nothing in the Decision of the Supreme Court of New Mexico that could in any manner be said to have produced an unanticipated result.

II.

Appropriate Procedures Were Available to Petitioner to Disqualify the Trial Judge, and Petitioner's Failure to Properly and Timely Use Same, Cannot Be Considered a Denial of Due Process.

In the State of New Mexico, there are two types of disqualification, i.e., constitutional and statutory. If a litigant chooses to disqualify a Judge on a constitutional ground, it is necessary that a motion, objection, or other appropriate remedy be invoked calling the grounds of disqualification to the Court's attention and demanding a ruling thereon. *Gutierrez v. Middle Rio Grande Conservancy District*, 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261, (1929); *Midwest Royalties v. Simmons*, 61 N.M. 399, 301 P.2d 334, (1956). A statutory disqualification is made by the filing of an Affidavit of Disqualification stating that the Judge before whom the matter is to be tried cannot preside over the same with impartiality, according to the belief of affiant, without any facts or grounds being

alleged, this method of disqualification being in the nature of a personal privilege.

The application to disqualify a Judge must be properly made. *In re Fox West Coast Theatres,* D.C. Cal., 25 F.Supp. 250, affirmed, C.C.A., 88 F.2d 212, (1937), certiorari denied, *Tally v. Fox Film Corporation,* 57 S.Ct. 944, 301 U.S. 710, 81 L.Ed. 1363, Rehearing denied, 58 S.Ct. 7, 302 U.S. 772, 82 L.Ed. 598, (1937). This is true in the State courts of New Mexico as well as elsewhere; an informal request is not sufficient. *Midwest Royalties v. Simmons,* supra.

The Western Union night letter sent on April 13, 1967, by petitioner to The Honorable Kermit E. Nash obviously could not be considered a proper application for disqualiffication. It apparently was based on alleged bias and prejudice rather than any constitutional grounds. It did not state that petitioner was disqualifying the said Judge, but rather requested the Judge to disqualify himself and to recuse himself from the matter.

It is to be noted that the said night letter from the petitioner further requested a postponement of the hearing set for May 2, 1967, and requested a return wire as to the Court's action on the said request as to postponement, as well as to disqualification.

That the disqualification of a Judge may be waived, especially where it is not based on constitutional grounds, is well supported by precedent. *State ex rel. Lebeck v. Chavez,* 45 N.M. 161, 113 P.2d 179, (1941); *State v. Garcia,* 47 N.M. 319, 142 P.2d 552, (1943); *United States v. Hethington,* C.A. Ill., 279 F. 2d 792, cert. den., 81 S.Ct. 271, 364 U.S. 908, 5 L.Ed. 224, (1960). In *State ex. rel. Lebeck v. Chavez,* the Supreme Court of New Mexico wrote:

> "We can see no distinction between the right to waive and the circumstances under which a party may waive such disqualification *before* having attempted to disqualify a judge, and the right to waive and the circumstances under which it may be done *after* the effort to disqualify. Our attention has not been called to any cases making

such a distinction, where the *right* to waive exists in the first place. We hold, therefore, that as to all causes of action set forth, petitioners have waived the question of disqualification, regardless of whether they had at first appropriately or irregularly attacked it."

After petitioner requested The Honorable Kermit E. Nash to recuse himself and to postpone the hearing, and did not obtain a favorable response to either request, petitioner finally on April 25, 1967, entered an appearance in the matter through New Mexico counsel, David L. Norvell, Esq., who then on April 27, 1967, filed petitioner's Affidavit of Disqualification, directed against all three Judges of the Fifth Judicial District, coverng three Counties. He followed this with a Motion for Continuance, mailed to opposing counsel on May 1, 1967, and obtained an Order from The Honorable Kermit E. Nash continuing the hearing to June 19, 1967. A further verbal continuance was also obtained by petitioner's counsel continuing the hearing to July 27, 1967.

The Supreme Court of New Mexico in its Opinion properly held that the action following the filing of the Affidavit of Disqualification effectively waived any right of disqualification claimed by petitioner. It is submitted that petitioner's request for a postponement by his night letter of April 13, 1967, would likewise constitute additional action, prior to the filing of the Affidavit of Disqualification, effectively waiving any right of disqualification.

In any event, having obtained the necessary continuances to prepare for the hearing, petitioner never again raised the matter of his attempted disqualification until the closing paragraphs of his Brief-In-Chief before the New Mexico Supreme Court. Compare *Rivera v. Hutchings*, 59 N.M. 337, 284 P.2d 222, (1955), on which petitioner relies, where counsel consistently through the trial and proceedings placed in the record his objection to the Court proceeding, obviously preserving the question for review, without waiver. If petitioner's counsel had desired to preserve any right of disqualification that he may have had, an application to the New Mexico Supreme Court for a Writ of Prohibition was also available, but was not used.

The Opinion of the New Mexico Supreme Court that any right of disqualification was effectively waived is undoubtedly correct. As to the assertions of lack of due process and equal protection under the Fifth and Fourteenth Amendments, made for the first time in petitioner's Motion for Rehearing before the New Mexico Supreme Court, petitioner's own failure to properly and timely use the procedural methods of disqualification available to him cannot be considered as a denial of due process and equal protection.

III.

The Refusal of the New Mexico District Court to Recognize Peck's Purported Will and the Pending Proceedings in the State of Texas Did Not Violate the Full Faith and Credit Clause.

In petitioner's appeal to the New Mexico Supreme Court, petitioner based his contention that the District Court erred in failing and refusing to honor and recognize the pending proceedings in Texas on the doctrine of comity, rather than the full faith and credit clause of the United States Constitution. In his Brief-In-Chief filed in the New Mexico Supreme Court, he states "A state court, in conformity to state policy, by comity, gives a remedy which the full faith and credit clause does not compel." It was not until his Motion for Rehearing was filed that he urged that the full faith and credit clause had been violated.

However, under neither the rule of comity nor the full faith and credit clause, was the District Court of Lea County required to recognize Peck's purported Will or the decree of the Dallas County Court admitting it to probate in that Court.

The Order of the County Court of Dallas County has been appealed from, and under the statutes of Texas (Vernon's Texas Rules Annotated—Civil Procedure, Vol. 3, Rule 335) is thus held in suspense. Since there is no finality, whatsoever, to the said Order of the Dallas County Court, it is not entitled to full faith and credit. In *Chapman v. John St. John Drilling Company*, 73 N.M. 261, 387 P.2d 454, 457, (1963), the Supreme Court of New Mexico stated:

"[4,5] It is not disputed that the award of the Texas Industrial Accident Board has been appealed in the manner provided by Texas law and that such appeal is now pending and undisposed of. We are thus confronted with the further question of whether the appeal denies the Texas award that finality requisite to invoke the full faith and credit clause. In an excellent annotation on 'Judgment as res judicata pending appeal or motion for a new trial, or during the time allowed therefor,' in 9 A.L.R.2d 984, 993, the general rule is announced that under the full faith and credit clause a foreign judgment is conclusive in another state only to the same extent it is conclusive in the state where it was rendered. It follows that a determination by the courts of Texas as to the finality of its judgment is controlling. It is well settled in Texas that 'an appeal from a judgment prevents its operation as res judicata.' Sabine Pilots Ass'n v. Lykes Brothers Steamship, Inc. (Tex. Civ. App. 1961) 346 S.W.2d 166, 169; Ray v. Hasley (5th Cir. 1954) 214 F.2d 366, 368."

Even assuming that the Order of the County Court of Dallas County was final, a New Mexico court would not be bound under any doctrine of comity to admit the Will in New Mexico, but would be entitled to re-examine the question of the jurisdiction of the Texas Court. This is a well recognized principle, and recognized by this Court. *Burbank v. Ernst*, 232 U.S. 162, 34 S.Ct. 299, (1914); *Holland v. Jackson*, 37 S.W.2d 726, (Supreme Court of Texas, 1931); *Barney v. Huff*, 326 S.W.2d 617, (Court of Civil Appeals of Texas, 1959); Page on Wills, 1941 Ed., Vol. 2, §726, p. 397. In *Burbank v. Ernst*, supra, wherein the Louisiana Courts had refused to recognize the probate of a Will in Texas on the ground that the testator died domiciled in Louisiana and thus the Texas Court had no jurisdiction, this Court upheld the Louisiana Court, and used the following language:

"Of course, the jurisdiction of the Texas Court depended upon the domicile of Burbank, which therefore was open to re-examination."

The Texas Courts also recognize that no jurisdiction exists

to admit a Will in Texas if the decedent was not domiciled in Texas and had no property therein on which the Will could operate. *Hardgrove v. De Tray,* 34 S.W.2d 379, (Court of Civil Appeals of Texas, 1931), affirmed, *De Tray v. Hardgrove,* 52 S.W.2d 239, (Commission on Appeals of Texas, Section A, 1932).

IV.

The Decision Below as to Peck's Domicile and Mental Capacity Is Based on a Proper Application of Precedents and Is Clearly Correct.

The whole of Peck's estate arises from the half section of land in Lea County, New Mexico, on which a Patent was finally issued in 1931. The reinstatement of Peck's homestead by the General Land Office was based on the fact that Peck became insane in 1912, *before* he left his homestead in New Mexico, as well as on the fact that he had made an entry, was an actual bona fide resident on the land up to the time of his insanity and had complied in good faith with the legal requirements up to the time of his becoming insane. Title 43, U.S.C.A., §172.

Since Peck was insane in 1912 before he left New Mexico, he is presumed to have been incapable of changing his domicile from the place it was when he became incompetent. *In re Collins' Estate,* 165 A. 285, 286, 11 N.J.Misc. 233, (1932); *Couyoumjian v. Anspach,* 103 N.W.2d 587, 594, 360 Mich. 371, (1960); *Sullivan v. Kenney,* 126 N.W. 349, 358, 148 Iowa 361, (1910); *Commonwealth v. Kernochan,* 106 S.E. 367, 129 Va. 405, (1921); *State v. Superior Court of Thurston County,* 255 P. 376, 143 Wash. 358, (1927); 96 A.L.R.2d 1236. Further, his incompetency is presumed to continue until otherwise shown. *Stanley v. Campbell,* 27 So.2d 411, 157 Fla. 891, (1946); *Belk v. Colleas,* 61 S.E.2d 464, 207 Ga. 328, (1950); *In re Peter's Estate,* 264 P.2d 1109, 1117, (1953); *Davis v. Davis,* 25 S.E.2d 181, 183, 223 N.C. 36, (1943); *Barrows v. Mutual Life Ins. Co. of New York,* 48 N.M. 206, 147 P.2d 362 (1944); *Bogel v. White,* 168 S.W.2d 309, (Court of Civil Appeals of Texas, 1942).

With these well recognized presumptions, the burden was

on petitioner to prove that somehow Peck had regained his mental capacity. This he was unable to do. His only witness, J. Mack Terrell, the owner and operator of the Rest Home where Peck spent his last three years, did not so testify. Petitioner never did explain how, after in 1963 having himself appointed as Peck's guardian in Dallas on an application supported by a doctor's affidavit that Peck was then of unsound mind, he can now contend that Peck had regained his mental capacity. As previously noted, the District Court in making its decision had the benefit of the testimony of two doctors, trained and experienced in psychiatry, one of whom was personally acquainted with Peck and had personal knowledge of his condition.

With there being no satisfactory proof that Peck had ever regained his mental capacity, the District Court was correct in finding that Peck's legal residency was still in New Mexico, where he was domiciled when he became insane, and with the whole of Peck's estate being located in New Mexico and petitioner refusing to bring the purported Will to New Mexico and offer it for probate, the District Court was fully entitled to proceed with determining heirship under the applicable New Mexico statutes in the proceedings in which said estate was being administered.

The petitioner in his Petition for Writ of Certiorari speaks of "plain fairness" and "simple justice," yet he seeks to gain the whole of his deceased uncle's estate, and to deprive his own brother and nephew of any share therein. What could be fairer and more just than to divide the Peck estate in equal shares among the three heirs-at-law, just as the District Court of Lea County did, and which the Supreme Court of New Mexico affirmed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Merrill L. Norton, one of the attorneys for Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this 26 day of September, 1969, I served copies of the foregoing Brief For Respondents In Opposition on counsel for petitioner by mailing said copies in duly addressed envelopes, with first class postage prepaid, to petitioner's respective attorneys of record, as follows:

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